IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.183 OF 2003

Shri Kishor Purushotam Thakkar
aged 24, residing at Room No.38,
Chawl No.2, Janta Nagar, Shivsena
Lane, Bhyander (West), Thane. ...Appellant.

V/s

State of Maharashtra (at the
instance of Inspector of
Police, Bhyander Police
Station, Thane) ...Respondent.

Mr. A.P. Mundargi, Sr. Cousnel withMr. S.V. Marvadi,
advocate for the appellant.

Mr. D.P. Adsule, APP for the respondent - State.

CORAM: V.M.KANADE,J.

DATE: 25th October, 2004.

ORAL JUDGMENT:

1. Appellant is challenging the Judgment and Order passed by the VIIth Additional Sessions Judge, Thane in Sessions Case No.898 of 1998. By the said Judgment and Order dated 31/01/2003, the appellant was convicted for having committed an offence punishable under section 376 of the Indian Penal Code and sentenced to suffer R.I. for 7 years and to pay fine of Rs 2,000/- and, in default of payment of fine, to further undergo R.I. for four months.

2. Prosecution case is that the accused had committed rape on a minor girl Dimple by taking her to his house. The allegation is that the accused Kishor had dragged her by catching her hand into his house and had closed the door, compelled her to sleep on the paper on the ground and removed her underwear and had committed rape on her and when she tried to raise hue and cry, he had pressed her mouth. The appellant/accused was residing in Nirmal Nagar and owned Masala Godown which was situated in front of the house of the complainant who was residing with her husband and two daughters in Room No.37. The incident in question took place on 14/04/1994. After the incident, Dimple narrated the incident to her mother who had examined her private part and had found that her vagina was swollen and tender. She took her to the Bhyander Police Station and a complaint was lodged against the accused. Dimple was taken to the Bhagwati Hospital for her examination and treatment. The accused was arrested. Clothes of the prosecutrix Dimple and the accused were sent to the Chemical Analyser and after the report was received, a charge-sheet was filed against the accused under section 376 of the Indian Penal Code. There was some dispute regarding the age of the accused and, therefore, an inquiry was made by the Juvenile Court

at Bhiwandi which recorded the statements of prosecution witnesses and gave a finding that the age of the accused was not 16 years but was 19 years on the date of the incident. The Juvenile Court, Bhiwandi, therefore, committed the case to the Sessions Court, Thane for trial. The Trial Court convicted the accused and sentenced him to suffer R.I. for 7 years and to pay fine of Rs 2,000/- and, in default, to suffer R.I. for 4 months.

3. The learned Counsel appearing on behalf of the appellant submitted that from the evidence of the doctor who had examined the prosecutrix, it could be seen that there was no vaginal bleeding and that her labia majora and labia minora were intact. There was no evidence of external injuries. However, there was circular breach in her hymen. He submitted that this evidence of P.W. 6 Nitin Yende clearly ruled out the case of rape. He submitted that the force had been exercised on the private part of a minor girl of the age of 10 years, labia majora and labia minora as also other internal organs would have been damaged. He submitted that the injuries would have been certainly more severe than those which were noticed in the present case. He submitted that, at the highest, the circular breach of the hymen of the girl indicated

that either hard and blunt object such as finger or pencil might have been inserted in the vagina. He submitted that, therefore, the case under section 376 was not made out. He submitted that there was also some dispute regarding the age of the accused and though a finding was given that he was 19 years of age, there was evidence to suggest from the Birth Certificate which was produced at the time of trial that the appellant may have been 16 years of age.

4. The learned APP appearing on behalf of the State submitted that the prosecutrix was examined by the prosecution and she had deposed in her evidence about the said incident in great detail and that her evidence was not shaken in the cross-examination. The learned APP further submitted that there was a tear in the hymen which clearly indicated that there was a penetration and, therefore, the offence under section 376 was proved beyond the reasonable doubt. He submitted that the evidence of the prosecutrix was corroborated by her mother and other independent witnesses. He submitted that immediately after the incident, mother of the prosecutrix had questioned the accused and this was done in the presence of other witnesses who have corroborated the said fact. The learned APP further submitted that no leniency should

be shown to the accused who had committed rape on a girl who was below 10 years of age.

5. Prosecution has examined the prosecutrix Dimple as P.W.5. who has stated that on the date of the incident she was 7 years of age and while she was playing in the lane, the accused came towards her, caught her hand, took her in the house, closed the door and then she was made to sleep on the loose paper which was spread on the ground and, thereafter, the accused removed her underwear and then he raped her. The prosecutrix raised shouts and made hue and cry. Thereafter, the accused opened the door and the prosecutrix got up and went towards her mother and told her about the incident. P.W. 1 - Champaben Patel, the mother of the prosecutrix has stated in her evidence that on the date of the incident her daughter was playing near godown of the accused and, after some time, she came home and told her what had transpired. P.W.1 has further deposed that she examined the private parts of her daughter and she found that her underwear was stained with blood. Thereafter, she went towards godown and gave to slaps to the accused. Thereafter, she went to the Police Station and lodged a complaint. P.W. 2 - Kavita Randeri who is also residing in the same locality has also corroborated

the evidence of P.W.1. She has stated that when she heard, the complainant - Champaben was shouting at the accused. She came and inquired with Champaben as to what had happened and then the complainant narrated the incident to her. She also saw that the complainant had given two slaps to the accused in her presence. She has stated that the accused prayed that he may be excused for his misdeeds. From the evidence of these witnesses, the presence of the accused is proved. The evidence of the prosecutrix also has to be accepted regarding the incident in question.

6. The next question which falls for consideration is whether the accused had committed an offence of rape? Prosecution has examined P.W. 6 - Nitin Purshotam Yende who was working as a Medical Officer at Bhagwati Hospital, Borivali. In his deposition, he has stated that on 15/4/1994 one woman had brought her daughter aged about 7 years to the Bhagwati Hospital and she has stated that there was a penetration of penis into the vagina of the girl. He has stated that the prosecutrix was complaining about pain in her private part and while passing urine. Initially she was examined by junior doctors and, thereafter, he examined her and found that her general condition was normal. He noticed that there was no evidence of

external injury on her other parts of the body. On examining her vagina, he noticed that her labia majora and labia minora were intact and there was a circular breach in her hymen. He took blood samples and swab from her vagina and sent it for medical examination. On examination of the vaginal swamp, no sperms were detected but few epithelial cells and few Bacteria were present. In his cross-examination, he has admitted that considering the age of the minor girl, if she was subjected to forcible intercourse then more severe injuries would have been caused and noticed. He, however, admitted that such severe injuries were not found in the present case. He has further admitted that circular breach of hymen was possible by insertion of hard and blunt object such as finger or pencil. He has further stated in his cross-examination that there was no vaginal bleeding present when he examined the patient. Similarly, there was no evidence of seminal secretion in the private part of the said girl. Prosecution has also examined P.W.8 - Virendra Khadtale who was a Medical Officer attached to V.N. Desai Hosptial, Santacruz who had initially examined the prosecutrix and, in his evidence, he has stated that on local examination of her private parts, he noticed that there was swelling on the labia majora and labia minora. He has stated

that he had examined the accused and he had found that there was no injury or pain on his genitals. In the cross-examination, he has stated that the injuries which were found on the private parts of the prosecutrix could have been caused by self infliction.

7. From the deposition of two doctors who are examined by the prosecution, it has been established that there was a circular breach in the hymen of the girl. However, there was no severe injuries which normally would have been found in the event of force being exercised on the minor girl. From the medical evidence which has come on record, it is difficult to accept the case of the prosecution so far as rape is concerned. The injuries on the private parts of the minor girl Dimple do suggest the possibility of some hard and blunt object like pencil or finger being inserted in her vagina which can be seen from the circular breach of the hymen. However, if the force had been used, there would have been injuries to labia majora and labia minora as also other private parts of the prosecutrix. The prosecution case of the appellant having committed rape is, therefore, not proved beyond the reasonable doubt as the medical evidence does not support the prosecution case. However, presence of the accused has been proved

beyond the reasonable doubt. The prosecutrix has stated that the accused had dragged her to the house and had removed her underwear and had raped her. It is possible that the prosecutrix was not in a position to see exactly what was done by the accused as she was not in a position to see insertion of penis in her private part. Thus, in my view, the accused had attempted to commit rape and had not succeeded in committing rape on the minor girl. The conviction, therefore, under section 376 will have to be set aside. Appellant is convicted under section 376 read with section 511 of the Indian Penal Code.

8. The appellant is in jail for more than one and half year. There was a dispute regarding his age and the matter was referred to the Juvenile Court in order to find out his age and, after inquiry, the Juvenile Court has given a finding that the age of the accused is 19 years. The case of the appellant before the Juvenile Court was that he was 16 years of age. Without going into the question as to whether the appellant was 16 years of age or 19 years of age, the fact remains that the accused was a young boy on the date of the incident. Accordingly, the following order is passed:-

O R D E R

. Conviction under section 376 I.P.C. is altered to section 376 read with section 511 I.P.C. and the appellant is sentenced to undergo the period which he has already undergone in jail. Appellant is in jail since 31/01/2003 and has undergone the sentence of one year and about 9 months. Appellant to pay fine of Rs 25000/-. Fine to be deposited within four weeks and in default of payment of fine, appellant to undergo R.I. for one year. Out of the amount of Rs 25,000/- which would be deposited towards the fine amount, Rs 22,000/- to be paid to the prosecutrix as compensation.

. Appeal is partly allowed in the above terms.

V.M. KANADE, J.